No. 3497.

United States Circuit Court of Appeals

For the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a corporation,
Plaintiff in Error,

vs.

SOPHIA MARTINEZ, Administratrix of the Estate of Carlos L. Martinez, Deceased,
Defendant in Error.

PETITION FOR A REHEARING

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TABLE OF AUTHORITIES CITED

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To the Honorable, the Judges of said Circuit Court of Appeals:

The plaintiff in error, Southern Pacific Company, hereby respectfully petitions, pursuant to Rule 29 of this Court, that a rehearing be granted herein. The judgment of the United States District Court for the District of Arizona was affirmed by this Court by an opinion filed herein on February 14, 1921, written by His Honor Circuit Judge Gilbert, and concurred in by Their Honors Circuit Judges Ross and Hunt.

We desire to urge three points:

(1) The nonapplication to the case of the provision of the Arizona Constitution: Sec. 5, Art. 18. "The defense of contributory negligence or of assumption of risk shall, in all cases whatever, be a question of fact and shall, at all times, be left to the jury."

(2) That the Cole case (251 U. S. 54) is not properly applicable because there was considered, whether such a state constitutional provision deprived defendant of a vested right and not, where as here, the case was tried de novo in a Federal court and the question is whether a state law can control Federal court procedure.

(3) That there was no evidence to the effect that the rails at the crossing projected above the road bed to a height of three or four inches.

This Court in its opinion says:

> "The negligence of the driver, and of the plaintiff's intestate in so attempting to cross the track might have sufficient to justify the Court below in directing a verdict for the defendant, but for the fact that the Constitution of Arizona provides:
>
> 'The defense of contributory negligence or assumption of risk shall in all cases whatsoever be a question of fact and shall at all times be left to the jury.'
>
> A similar provision in the Constitution of Oklahoma was under consideration in *Chicago, R. I. & P. Ry. Co.* vs. *Cole,* 251 U. S. 54, in which the constitutional provision was held to require the submission of the defense to the jury in a case where the plaintiff's intestate stepped upon the railroad track when a train was approaching in full view and was killed."
>
> Also: "That there was evidence that the rails (at the crossing) projected above the road bed to a height of three or four inches, that the space between the rails was very rough."

We respectfully submit:

(1) That there was no question of the contributory negligence of plaintiff's intestate involved in the case.

(2) That the constitutional provisions referred to does not apply to cases of this character, but only applies to cases between master and servant.

(3) That the Supreme Court of Arizona has held that the constitutional provision referred to does not apply to this kind of a case.

(4) That the Supreme Court of Arizona has held, even in cases between master and servant, and notwithstanding the constitutional provision referred to, that, under certain circumstances, the question of negligence of the injured person is for the Court.

(5) That under the evidence in this case the question of negligence of plaintiff's intestate was one of law for the Court.

(6) That there is no evidence in the record showing that the rails (at the crossing) projected above the road bed to a height of three or four inches.

There can be no contributory negligence in a case unless it is pleaded by the defendant. The defendant in this case did not plead contributory negligence. It pleaded that the injuries were directly, immediately and proximately caused by the gross fault, negligence and carelessness of plaintiff's decedent himself, and not by any fault, negligence or carelessness on the part of the defendant or any of its officers, agents, servants or employees. (Tr. 23.)

The Supreme Court of Arizona in the case of *Consolidated Arizona Smelting Co.* vs. *Gonzales,* decided November 24, 1920, 193 Pac. 304, and being a case between master and servant, holds that such a plea does not amount to a plea of contributory negligence and that it was error for the trial Court to instruct the jury on the question of contributory negligence.

In that case the defendant pleaded that the plaintiff's carelessness, fault, negligence and improper conduct was the proximate and direct cause of his said injuries.

However, the Supreme Court of Arizona, in the recent case of *Twohy Bros.* vs. *Kepon,* decided November 24, 1920, 193 Pac. 296, has settled the question as to whether or not the constitutional provision referred to applies to cases other than cases between master and servant, and we quote here at length from the opinion of the Supreme Court of Arizona in that case.

> "Where plaintiff, an experienced miner, injured while following a trail, by a blast on right of way being constructed by defendant, heard and understood the word 'Fire,' and immediately got into a safe position behind a wagon, but then in two or three minutes proceeded on his way in the open until the explosion occurred, five or six minutes after the warning, he was, under the facts, as a matter of law guilty of contributory negligence."

> "Where the whole testimony and all legitimate inferences therefrom show injury to one by reason of his own want of ordinary care, his negligence is for the Court."

"BAKER, J.—This action was brought to recover damages for personal injuries sustained by the plaintiff on the 24th day of December, 1918, he having been struck by a stone that came from a blast set off by the defendant. The gravamen of the complaint was negligence, and the breach of duty alleged against the defendant was its failure to give plaintiff any notice or warning of the blast. The charge is couched in the following language:

'The defendant, without any notice or warning to plaintiff, caused or permitted a high charge of said gun powder, dynamite, blasting powder, or other high explosive to be discharged.'

The defendant's answer denied each and every allegation in the complaint, setting forth negligence on the part of the defendant, and affirmatively alleged that plaintiff's injuries were the direct result of his own careless and negligent act. At the close of all the evidence in the case the defendant moved the Court for a directed verdict, but the Court denied the motion. This was error. The undisputed testimony, without conflict, established the following facts:

That at the time of the accident the defendant, Twohy Bros. Company, was engaged in the construction of a railroad road bed for the United Verde Tunnel Smelter Railroad Company near the town of Jerome, Yavapai County, Ariz.; that in the construction of the road bed it was necessary for the company to carry on blasting operations; which the company was doing when the accident happened; that between 4 and 5 o'clock on the day of the accident the plaintiff, Peter Kepon, and one Mike Racich, were returning from work at a lime quarry, some distance from the town of Jerome,

to their homes in said town, over a trail which passed in the vicinity of a fill and culvert being made by the defendant, known as the 500-foot level; that this trail was on land owned by the United Verde Copper Mining Company, and was used by men employed by the United Verde Copper Company in going to and from work at the lime quarry and other places; that when the plaintiff reached a point on the trail about 50 feet from a dump wagon near the trail, and about 500 feet, more or less, from the fill or culvert above mentioned, he heard some one cry 'Fire' once or twice; that it was five or six minutes from the time he heard the cry of 'Fire' until the explosion occurred; that he and the said Racich got behind the dump wagon, and stayed there for two or three minutes; that the plaintiff left the wagon, and had gone 150 to 200 feet, when the explosion occurred, and he was struck in the foot by a rock; that plaintiff at the time of the accident was 33 years old, and had been engaged in the mining business since he was 18 years old, and had a great deal of experience in handling dynamite and other explosives, and that he was familiar with the work being carried on by defendant at the place of the accident, and knew that they were doing blasting at that place, and knew the cry of 'Fire' was the warning of an impending blast.

In *Shearman & Redfield on the Law of Negligence,* vol. 3, par. 688a, it is said:

'Of course, a person who is warned that a blast is about to be made cannot voluntarily remain in a place of danger without losing his right of action if injured'—citing *Sullivan* vs. *Dunham,* 10 App. Div. 438, 41 N. Y. Supp. 1083; *Graetz* vs. *McKenzie,* 9 Wash. 696, 35 Pac. 377.

(1) Certainly, if he cannot voluntarily remain in a place of danger after being warned,

without losing his right of action, if injured, he cannot voluntarily leave a place of safety, after being warned, and go to a place of danger, and recover, if injured. The plaintiff was a miner of a great deal of experience in handling dynamite and other explosives, and was familiar with blasting; he heard the cry of 'Fire,' and well understood the import and meaning of the warning, and immediately went to a place of safety behind the wagon. He remained there a few brief moments, and then voluntarily left the place of safety, and went out into the open, and was injured by the explosion, which occurred within five or six minutes from the time the warning was given. The peril of going out into the open must have been obvious to any man of ordinary intelligence, much more so to an experienced miner familiar with blasting, yet the plaintiff of his own accord chose to abandon his secure position and challenge the danger by which he was injured. The defendant was not required to take better care of the plaintiff than the plaintiff took care of himself. Indisputably the cause of his injury was his own negligence.

(2) A case far less clear would suffice for the dismissal of the complaint. It is apparent upon the record that the plaintiff was timely warned of the impending blast, and that his injury was due to his own negligence and reckless act; hence he could not recover. Where the whole testimony and all legitimate inferences therefrom show that plaintiff was injured by reason of his own want of ordinary care, the question of his negligence is for the Court, and not for the determination by the jury. *Calumet & Arizona Mining Co.* vs. *Gardner,* 187 Pac. 563.

> The judgment is reversed, with directions to dismiss the complaint."

Even in cases between master and servant the Supreme Court of Arizona has held in a number of recent cases, notwithstanding the constitutional provision referred to, that, where the facts are undisputed, and the inferences can lead but to one conclusion, the question of negligence of the injured person is for the Court.

> *Calumet & Arizona Mining Co.* vs. *Gardner* (Ariz.), 187 Pac. 563;
>
> *Consolidated Arizona Smelting Co.* vs. *Gonzales, supra;*
>
> *Inspiration Cons. Copper Co.* vs. *Taylor* (Ariz.), 193 Pac. 305.

In the case of *Calumet & Arizona Mining Co.* vs. *Gardner, supra,* the Supreme Court of Arizona, said:

> "We think it was the clear and undoubted duty of the Court to grant the motion for an instructed verdict upon both grounds urged, and since in no view of the evidence is the plaintiff entitled to recover, the cause is remanded, with directions to dismiss the complaint."

The constitutional provision under consideration is similar to the Oklahoma constitutional provision involved in the case of *C. R. I. & P. Ry. Co.* vs. *Cole,* 251 U. S. 54, but the construction given that provision by the Supreme Court of Oklahoma in

that case when it was before that Court, *Dickinson, Receiver of C. R. I. & P. Ry. Co.* vs. *Cole,* 177 Pac. 570, was not adopted by the framers of the Arizona Constitution, as the Cole case was decided by the Supreme Court of Oklahoma on December 24, 1918, and the constitution of Arizona was adopted December 9, 1910.

While the Supreme Court of Oklahoma in the Cole case, *supra,* did hold that such constitutional provision applied to a case where the plaintiff's intestate stepped upon the railroad track when a train was approaching in full view and was killed, the question as to whether or not such constitutional provision applied to such a case was not involved in the appeal of the case to the Supreme Court of the United States, as the only question raised on such appeal and the only question considered by the Supreme Court of the United States was as to whether or not such provision was in contravention of the 14th Amendment to the Constitution of the United States.

But in the Cole case as pointed out in our Reply Brief there was a substantial conflict in the evidence as to the negligence of the railroad company, and evidence that the train was running at a speed prohibited by ordinance of the city which constituted negligence *per se.* 177 Pac. 571.

The Supreme Court of Oklahoma in the case of *C. R. I. & P. Ry. Co.* vs. *Duran,* 134 Pac. 876, and in a case between master and servant, has held that this constitutional provision does not relieve the party suing for damages for an alleged injury from the burden of proving that the injury was the proxi-

mate result of negligence on the part of the party sought to be charged; and that where there is no evidence reasonably tending to show that such party sought to be charged was guilty of negligence, it is error for the trial Court to submit such issue to the jury.

The Supreme Court of Oklahoma in the case of *St. L. I. M. & S. R. Co.* vs. *Gibson,* 48 Okl. 553, 150 Pac. 465, which was a crossing accident case, has held:

(Quoting from the syllabus)

> "Where plaintiff's evidence shows that deceased was standing to one side of the railroad track, in a place of safety, and knew that a train was approaching, and had waited to see the train pass, and suddenly attempted to run across the track, immediately in front of, and in full view of, a moving train, and was struck by the train before he could run across the track, the company could not be liable, and a demurrer to the evidence should have been sustained."
>
> "Where the employees of a railroad company, on approaching a crossing, fail to ring the bell and sound the whistle, if the evidence leaves a doubt as to whether the deceased saw the train, or knew that it was approaching, then the failure of defendant to ring the bell and sound the whistle would raise a question to be submitted to the jury as to whether or not that failure was the cause of his going upon the track, and thereby losing his life. But when plaintiff's own evidence is that deceased had waited to see the train pass, knew it was approaching, and ran upon the track immediately in front of and in full view of the moving cars, it could not be said the failure to ring the bell and sound the

whistle was in any manner responsible for his going upon the track, and there is no question, on that phase of the case, to submit to the jury."

(Quoting from opinion)

"The defendant's liability in this case was based upon negligence. And if the defendant was negligent, and there was any evidence which reasonably tended to establish a causal connection between that negligence and the death of deceased, then it should have been submitted to the jury, but, if there was no such evidence, then it was error for the Court not to sustain the demurrer. In other words, if there was any evidence, that tended to show that the death of plaintiff's son was caused by the carelessness and negligence of the defendant, or that the defendant, after it discovered his peril, by the exercise of ordinary care and diligence could have prevented the accident and saved his life, then that evidence should have been submitted to the jury; but, if there was no such evidence, the Court should have sustained the demurrer."

"But there is one other question to be considered: Plaintiff's evidence developed the fact that the defendant did not ring the bell or sound the whistle on approaching the crossing where the deceased was killed. Then would that evidence, under the circumstances of this case, suggest a causal connection between the death of deceased and this failure of defendant? If the evidence had left a doubt as to whether or not deceased saw the train, or knew that it was approaching, then the failure of defendant to ring the bell and sound the whistle would have raised a question as to whether that failure was not the cause of his going upon the track, and thereby losing his life. But the plaintiff's own

witness testifies that deceased had waited to see the train pass, and ran upon the track with the train in full view. It cannot be said with any degree of reason that the fact that he ran upon the track was due to this failure of defendant."

"The rule of law is well settled that if the evidence of the plaintiff, with all the inferences which the jury could justifiably draw from it, fails to establish a cause of action on behalf of the plaintiff, it is the duty of the trial Judge to sustain a demurrer to the evidence, when interposed. We think the evidence in this case wholly fails to establish the plaintiff's cause of action, and that the demurrer should have been sustained.

We therefore recommend that the judgment be reversed, and the cause remanded, for further proceedings not inconsistent with this opinion."

In another crossing accident case, *C. R. I. & P. Ry. Co.* vs. *Barton,* 159 Pac. 250, the Supreme Court of Oklahoma held:

(Quoting from syllabus):

"Section 6, art. 23 (Williams') Constitution, providing that the defense of contributory negligence shall in all cases whatsoever be a question of fact, and shall, at all times, be left to the jury, does not take from the Courts the right to ascertain whether the three necessary elements of primary negligence exist, *viz.:* (1) The existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) the failure of the defendant to perform that duty; and (3) injury to the plaintiff resulting from such failure."

" 'Contributory negligence' is an act or omission on the part of the plaintiff amounting to want of ordinary care which, concurring or co-operating with the negligent act of defendant, is the proximate cause of the injury complained of, and necessarily presupposes negligence on the part of the defendant."

The Supreme Court of Oklahoma in its opinion said:

"The acts of negligence relied upon for recovery are numerous, but the questions necessary for a determination of the controversy are: Was there any evidence offered reasonably tending to prove that the defendant was guilty of negligence? If guilty of such negligence, was it the proximate cause of the injury?"

"Plaintiff insists that since the Constitution (section 6, art. 23, Williams' Con.) provides that the defense of contributory negligence shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury; that the Courts have not the right to inquire as to whether or not the negligence was the proximate cause of the injury, as this would require a determination of whether the party injured was guilty of contributory negligence. Contributory negligence is an act or omission on the part of the plaintiff, amounting to want of ordinary care, which, concurring or co-operating with the negligent act of defendant, is the proximate cause of the injury complained of, and necessarily presupposes negligence on the part of the defendant."

"If therefore contributory negligence can never exist except where the injury resulted from the primary negligence of the defendant

as a concurring proximate cause, then it becomes the duty of the Court to first ascertain if the facts, as disclosed by the evidence, constitute primary negligence; if the essential elements of such negligence are not established, the defense of contributory negligence does not exist and would not be a question of fact for the jury under Section 6, *supra.*

Whether the facts in a given case constitute primary negligence, where the injuries are not willful and intentional, must depend upon whether the three essential elements of negligence are shown, *viz.:* (1) The existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) the failure of the defendant to perform that duty; and (3) injury to the plaintiff resulting from such failure.

The cause should therefore be reversed and remanded for a new trial."

It was not the intention of the framers of the Constitution of Arizona that this provision should apply to cases other than cases between master and servant.

The provision appears in Article 18 of the Arizona Constitution, headed and entitled, *Labor* (*Rev. Sts. Arizona,* 1913, p. 168).

Section 1 provides that eight hours shall constitute a lawful day's work, etc.

Section 2 refers to child labor.

Section 3 prohibits employers from requiring from employees contracts exempting employers from liability for personal injuries.

Section 4 abolishes fellow-servant doctrine.

Section 5 (the one under consideration) refers to contributory negligence and assumption of risk (of employees).

Section 6, refers to amount to be recovered by employee for personal injuries.

Section 7, provides that the Legislature shall enact an Employers' Liability Law.

Section 8, provides that the Legislature shall enact a Workmen's Compulsory Compensation Law.

Section 9 refers to "black list."

Section 10 (the last section), prohibits employment of aliens on public work.

In pursuance of this Article 18 of the Arizona Constitution, the Legislature of Arizona did thereafter enact what is known as the Employers' Liability Act, Chapter VI, Title 14, Revised Statutes of Arizona, 1913, and embodied the constitutional provision referred to, in Paragraph 3159.

> "3159. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times, regardless of the state of the evidence relating thereto, be left to the jury, as provided in Section 5 of arti-

a time when the safety gates at such crossing are not down, was or was not guilty of contributory negligence shall be a question to be determined by the jury, in all actions brought to recover damages.

On the trial in the United States District Court that Court gave peremptory instructions for the defendant.

Plaintiff contended that under the New Jersey statute referred to the Court was bound to submit the cause to the jury.

The Circuit Court of Appeals said:

> "We do not understand the New Jersey statutes have abolished the defense of contributory negligence, or relieved the Court from deciding the question of law where it arises, whether the undisputed facts show a plaintiff is guilty of contributory negligence."

> "Regarding, therefore, such statutes as rules of procedure, it is clear that such rule of procedure, enacted in New Jersey, could not affect the procedure of a case litigated in the Court below, and therefore the District Court of the Eastern District of Pennsylvania had the right, and it was its duty, to hold that, if the facts clearly showed the plaintiff contributed to the accident, she could not recover. This duty it met, and the only question here involved is whether it erred in deciding that question as a matter of law and refusing to submit it to the jury."

The judgment of the District Court in favor of defendant was affirmed.

III.

On the other question as to the condition of the crossing, we cannot help but think that this Court has inadvertently misinterpreted some of the testimony with reference to the crossing.

Plaintiff's allegation in the complaint as to the condition of the crossing is:

> "and the defendant was further negligent in leaving rails of said crossing projecting above the ground or surface on either side of said track to a height of to-wit, five inches" (Tr. p. 4).

But the rails,, from base where they rest on the ties to the top of the ball, are only 5½ inches in height. (Testimony of F. R. South, Section Foreman, Tr. p. 92.)

The photograph (Tr. p. 121) which was taken immediately after the accident, and when the conditions were exactly the same as when the accident occurred shows conclusively that the rails did not project above the road bed to a height of three or four inches.

Testimony of J. A. Ford, Roadmaster:

> "You have to have space there on the inside of each rail for the flange to run in." (Tr. 90.)
>
> "The crossing had been repaired three or four days prior to that and some rock put in at that time." (Tr. 91.)
>
> "The rails did not stick up four or five inches, they probably stuck up a half inch or so." (Tr. 91.)

"There was practically a flush surface there except where the flange runs next to the rails." (Tr. 91.)

F. R. South, the section foreman, testified:

"The tops of the rails at the crossing did *not* stick up above the material in between the rails four or five inches." (Tr. 92.)

"The height of the rails there is five and one-half inches." (Tr. 92.)

"I should say the rails were not sticking up above the ballast more than a half inch at most." (Tr. 92.)

H. C. Ballard testified:

"I examined the crossing the next day after the accident. It was in very good condition. About half or two-thirds of the ball of the rail showed on one side, the other side was not so high—with the exception, of course, where the flange runs. Where the flange of the wheel of the locomotive and cars run next to the rail, there was a small space. On the inside it was very near as high as the rail. I drove over the crossing in an automobile the Friday before the accident and Monday night. The accident occurred Monday." (Tr. 96.)

Robert Mackay testified:

"I was familiar with this crossing where this accident occurred. I saw it a couple of hours after the accident. The crossing was in good shape. The material in between the rails was higher than the rails. The rock and dirt in the middle of the track was higher than the rails. The space that was left for the flange about three or four inches from the rail was lower; but then further on, it was higher than the rail over to some distance until you get on the other

side. I crossed over this crossing after the accident in an automobile—had no trouble in crossing." (Tr. 98-99.)

Y. T. Womack, plaintiff's witness, testified:

"Had occasion to go over this crossing at different times—thousands of times. I never had very much trouble crossing it." (Tr. 100.)

"I know this crossing was repaired a few days before the accident; I do not know how many days—filled in with ballast, crushed rock and more or less dirt with it." (Tr. 101.)

John Bright, plaintiff's witness, testified:

"Was acquainted with the crossing where this accident occurred. I crossed there in the evening of March 25, 1917, about two o'clock after the accident happened. I did not exactly examine the premises—the crossing when I crossed. It was rough—most of the time it was. The rails were a little high. It is up grade. You went up grade, going up to the crossing about four feet." (Tr. 61.)

When Mr. Bright said here that "the rails are a little high," he meant that the road bed of the railroad and the rails were higher than the surrounding country.

He further testified:

"There was not any boards on the crossing. Coming up to the rails on the outside, it was pretty well filled in, but the cars and trucks and things going over the crossing, you know, cuts it down in some places about where the wheels would run, you know, *but right in the middle between the rails where the cars would naturally run was fairly full,* you know, but there

were places in that track where the rails was down—the filling was down below the ball of the rail. Where the dust was below the ball of the rail." (Tr. 61.)

"Q. Well, how much of the rails, if any, were extending above the surface, Mr. Bright? Tell the jury just how you found the rails and conditions there."

"A. Well, it would be hard to say. It was not the same all the way; it would not be the same all the way. It was, as you say, where the wheels had cut, it would be a little deeper, you know. That space, it would be a little deeper there than it would a little further over where the wheels were not cutting so much, and right in the middle, in between the rails where the wheels did not run, the track was nearly full. They would cut down at the edges a little further below the ball of the rail, especially between the rails." (Tr. 62.)

"Q. Mr. Bright, state the condition after you got in the center of the track, or after you got over one rail, state to the jury just what condition you found the second rail, whether it was flush or whether it was dug out."

"A. It was not flush you know. All of the ball of the rail was showing there at the crossing." (Tr. 62.)

Taking the most favorable view of the testimony of the witness Bright, for the plaintiff, it simply amounted to this: "that the dirt was below the ball of the rail, that all of the ball of the rail was showing there at the crossing, especially on the inside between the rails."

It was absolutely necessary to leave a space on the inside of each rail for the flange way of the wheels of the locomotives and cars, in order to avoid derailing the trains. (Tr. 90.)

The flange way is what the witness Bright was referring to when he stated that all of the ball of the rail was showing on the inside of the rails. The ball of the rail on the inside would necessarily have to show, otherwise it would be very dangerous to run trains over the crossing.

There was no duty resting upon the defendant to keep the crossing so smooth and free from all inequalities that no jar or jolt would be caused by vehicles passing over the crossing.

> *St. L. & S. F. Ry. Co.* vs. *Dyer* (Ark.), 113 S. W. 49.

In the case of *Peterson* vs. *C. M. & St. P. Ry. Co.* (Iowa), 170 N. W. 452, which was a case practically on all fours with the instant case, and was brought under a statute of Iowa which provided that "every railway shall construct, at all points where such railway crosses any public road, good, sufficient, and safe crossings," the Supreme Court of Iowa held that such statute did not impose upon the railway company the duty to make the crossing absolutely safe, but that all that was required was to make it reasonably safe for travel, and that an elevation of from two to three inches between the road surface and the top of the planks did not tend to show negligence, either in the construction or maintenance of the crossing.

IN CONCLUSION

We therefore respectfully submit that in view of the foregoing and especially in view of the very recent decisions of the Supreme Court of Arizona now called to Your Honors attention, a rehearing should be granted herein, and that the judgment of the District Court should be reversed and remanded with directions to enter judgment for defendant.

In the event this petition be granted we do not waive the other points for reversal made by plaintiff in error, but we believe the points we make in this petition to be sufficient to dispose of the case.

Respectfully submitted,

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The undersigned one of the Counsel for Plaintiff in Error hereby certifies that in his judgment the foregoing petition is well founded and further certifies that said petition is not interposed for purposes of delay.

HENLEY C. BOOTH,

Of Counsel.